statesman he was distinguished for his bitter hatred of the Catholics and his violent opposition to every species of reform.

For a brief period in 1868, and again from 1874 to 1880, the head of the English judicial system was Hugh McCalmont Cairns, Lord Cairns. He is considered by many to have been the ablest lawyer of his time. He was not, however, deeply versed in black-letter learning, like Willes and Blackburn, but was distinguished rather for his exhaustive discussion of a matter on principle. His great attribute was lucidity. Probably no other judge of any time has possessed a power of clear statement equal to that of Lord Cairns. One of his biographers has described his appearance in court to be "cold, impersonal, like an intellectual machine minting law." Though born in Ireland, Lord Cairns was of a Scotch family, and was through life an ardent evangelical churchman. His great piety is said to have been something of a jest among members of the bar, and to have been traded upon by the unscrupulous, like the vice of another man. He was almost as great a statesman as a judge, and he was influential in passing the Judicature Acts. He took his recreation in the hunting field on Saturdays and in shooting on the moors of Scotland in the vacation. His great career is the more remarkable in view of the fact that he had to struggle continually with physical weakness and illness, and to take constant precautions in order to be fit for any work.

RECENT CASES.

AGENCY — WARRANTY OF AUTHORITY — PUBLIC OFFICERS. — Defendant, a public officer, acting in excess of his authority, employed plaintiff on behalf of the Crown for three years. Plaintiff was discharged within that time, and brought action against defendant. *Held*, that the doctrine that an agent who makes a contract for his principal impliedly warrants his authority does not apply to a public servant acting on behalf of the Crown. *Dunn* v. *Macdonald*, [1897] 1 Q. B. 401.

This limitation of the doctrine of *Collen* v. *Wright*, 8 E. & B. 647, is based on the rule of policy laid down in *Macbeath* v. *Haldimand*, 1 T. R. 172, and *Gidley* v. *Lord Palmerston*, 3 B. & B. 275, to the effect that an action will not lie against a public servant for any liability contracted in the course of his public employment. The principal case pushes that rule as far perhaps as would be advisable. It may, however, be justified by the danger of deterring responsible persons from entering the public service, if an honest mistake in interpreting their powers is likely to result in their being personally liable on contracts made for the government.

BILLS AND NOTES — CHECK AN EQUITABLE ASSIGNMENT. — The president of the K. Bank in Philadelphia requested a loan of $25,000 from the plaintiff bank of the same city, representing that the K. Bank owed a large balance at the clearing-house, but had a credit of $27,000 with its New York correspondent, and offering to give a check thereon for the amount of the loan. Relying upon these representations, the plaintiff bank advanced the money, and received the check. The K. Bank failed the next day. *Held*, an equitable assignment of the fund on deposit with the New York correspondent was created, so that the plaintiff bank could claim the amount of the check as against the receiver of the drawer. Gray, Brewer, and Peckham, JJ., dissenting. *Fourth Street Nat. Bank* v. *Yardley*, 17 Sup. Ct. Rep. 439.

The court, while distinctly recognizing that a check does not constitute an equitable assignment of the drawer's funds in the hands of the drawee, (see 10 HARVARD LAW REVIEW, 523,) makes an exception in the principal case on the ground that the transaction was not within the ordinary course of business, and the circumstances implied an actual intent to create an assignment. It may be doubted if such an implication could be properly drawn from the facts. Even if the facts warranted the finding of an implied assignment, the action would lie; not on the check, for a check, being a general order to pay money, cannot be construed as an assignment of a particular fund:

but upon a collateral agreement for an equitable assignment, of which the check is evidence. This distinction does not seem to be clearly made by the court.

BILLS AND NOTES — PROVISION FOR ATTORNEY'S FEES. — A note for a certain sum maturing at a certain date contained a provision for the payment of ten per cent attorney's fees in case of suit for collection. *Held*, that this provision rendered the amount uncertain, and so destroyed negotiability. *Sylvester Bleckley Co.* v. *Alewine*, 26 S. E. Rep. 609 (S. C.).

There has been much conflict of opinion on this point, but the weight of authority in the later cases is undoubtedly in favor of the negotiability of instruments with such provisions. The provision does not render uncertain the amount due at maturity; it is not a part of the main promise, and it only takes effect, if at all, after maturity. Nor is it so foreign to the main promise as to be a burden on the note. It is instead an aid to circulation. *Stapleton* v. *Louisville Banking Co.*, 23 S. E. Rep. 81 (Ga.); 14 Fed. Rep. 671, note.

BILLS AND NOTES — THE ANOMALOUS INDORSER. — *Held*, that the liability of a third person placing his name on the back of a note payable to the maker's own order, before or at the time of delivery by the maker, is presumptively that of a surety of the maker, but that it is open to such third person to show a different agreement between the parties. *Ewan* v. *Brooks-Waterfield Co.*, 45 N. E. Rep. 1094 (Ohio). See NOTES.

CONFLICT OF LAWS — DETERMINATION OF NATURE OF FOREIGN STATUTE — PENAL LAWS. — *Held*, the liability of a stockholder of a foreign corporation under the statute of the foreign State will not be enforced in Massachusetts unless the liability is held contractual by the courts of that State. *Coffing* v. *Dodge*, 45 N. E. Rep. 928 (Mass.). See NOTES.

CONFLICT OF LAWS — DOMICILE — DIVORCE. — A wife left her husband in New York and went into another State, where she secured a divorce and married another man. She then returned with him to the State of her former husband. *Held*, that the divorce and subsequent marriage were void. *McGown* v. *McGown*, 43 N. Y. Supp. 745.

It is generally conceded that a wife cannot acquire of her own accord a separate domicile from her husband's. *Yelverton* v. *Yelverton*, 1 Sw. & Tr. 574; and as it is settled law that a divorce can be obtained only at the domicile, it was not improper to regard this divorce as invalid. 1 Bishop, Mar., Div., and Sep. § 837. And while it is the rule that the validity of marriage is determined by the law of the place of its consummation, Story, Conflict of Laws, 6th ed. § 113, for the New York court to recognize this subsequent marriage would be to consider the woman in the impossible relation of wife to two husbands. Story, ib., § 373*f*.

CONFLICT OF LAWS — FOREIGN STATUTE — ACTION FOR CAUSING DEATH. — A statute of New Mexico provided that, whenever any person should be killed through the negligence of a railroad official in charge of a train, the corporation should forfeit and pay five thousand dollars, which could be recovered by the husband or wife or minor children of the deceased. *Held*, that the liability created by this statute would not be enforced in Kansas. *Dale* v. *A., T., & S. F. R. R. Co.*, 47 Pac. Rep. 521 (Kan.). See NOTES.

CONSTITUTIONAL LAW — DEPRIVATION OF LIBERTY — RIGHT TO FREEDOM OF CONTRACT. — The plaintiff became a member of a railway relief association, under an agreement that the acceptance of benefits therefrom for disability should operate as a release of all claims for damages against the defendant railway company. An Ohio statute purported to make such agreements void. The plaintiff, being injured by the negligence of the defendant, accepted aid from the relief association and then sued defendant. *Held*, he could not recover. The statute was unconstitutional, as depriving plaintiff of liberty, and also as class legislation. *Shaver* v. *Pennsylvania Co.*, 71 Fed. Rep. 931. See NOTES.

CONSTITUTIONAL LAW — FOURTEENTH AMENDMENT — "LIBERTY." — A Louisiana statute imposed a penalty on the doing of any act within the State to effect a contract of insurance in another State on property in Louisiana in a company which had not complied with the statutory requirements for doing an insurance business in Louisiana. In an action for the penalty, judgment had been rendered against the defendant. On error to the Supreme Court of Louisiana, *held*, the term "liberty," as used in the Fourteenth Amendment, secures not merely the right to freedom from physical restraint, but also the right "to pursue any livelihood or calling; and for that purpose to enter into all contracts which may be proper." The statute in question unwarrantably interferes with this right, and is therefore unconstitutional. *Allgeyer* v. *State*, 17 Sup. Ct. Rep. 427.

This is a notable decision, not merely on account of the importance and difficulty of the question of interpretation here decided, but also from the fact that inferences from some former opinions of the court seemed to indicate that the court was not inclined to accept this vague and comprehensive interpretation of the term "liberty." Cf. *Slaughter House Cases*, 16 Wall. 36. There was, however, a line of *dicta*, beginning in the opinions of the dissenting justices in the *Slaughter House Cases*, in which the broad interpretation of the term "liberty" had been approved. The discussion of the question of interpretation in the opinion in the principal case, confined as it is to the quotation of several *dicta* taken in the main from a dissenting opinion in the *Slaughter House Cases*, hardly seems adequate. The weight of the case is further lessened by the consideration that the decision might have been rested on the ground that the statute in question was an improper interference with interstate commerce.

CONTRACTS — SUBSCRIPTIONS — CONSIDERATION. — Plaintiff's intestate gave his promissory note, stated on its face to be "for the endowment" of the payee corporation. On the strength of such and other notes the corporation incurred liabilities. *Held*, that the note was valid. "The consideration is the accomplishment of the purposes for which the university was incorporated." *Irwin* v. *Lombard University*, 46 N. E. Rep. 63 (Ohio).

The decision is one in the law of charitable subscriptions, rather than in that of bills and notes. As cash and other such notes were given, and the court states that "the character of the obligation as a subscription is not affected by the fact that it is a separate paper," it seems that the note was given without any previous subscription. The present law seems to make the test of sufficiency of consideration "a detriment to the promisee." 8 HARVARD LAW REVIEW, 33. But even under the definition here adopted, viz. "a benefit to the promisor or a detriment to the promisee," it is difficult to see how a consideration is worked out. The case shows to what extremes a court will go to uphold the validity of such subscriptions, for the court, considering the law of Ohio to be settled, goes so far as to make up a subscription paper of separate promissory notes. See Anson on Contracts, 8th ed. 109, note, for the various theories. *Presbyterian Church* v. *Cooper*, 112 N. Y. 517, is *contra*.

CORPORATIONS — CAPACITY TO TAKE PROPERTY BY DEVISE OR BEQUEST ULTRA VIRES. — A corporation, created under a statute enabling it to take, by devise or bequest, property the income of which did not exceed a certain amount, was residuary devisee and legatee of property to a greater amount. On a bill by heirs and next of kin to construe the will, *held*, the question of the capacity of the corporation to take in excess of the statutory limit could be raised only by the State. *Congregational Society* v. *Everett*, 36 Atl. Rep. 654 (Md.).

The case follows a previous decision to the same effect. *Hanson* v. *Little Sisters of the Poor*, 79 Md. 440. (See 9 HARVARD LAW REVIEW, 350.) The court rests its decision squarely on the principle stated, though both this and the previous case could have been supported on other grounds, had the court so chosen. No distinction was taken between personalty and realty. As to the former, the doctrine seems wrong on principle and authority. *In re McGraw*, 111 N. Y. 66. But as to the latter, the reasons for upholding the principle seem to outweigh the arguments advanced in opposition to it, for the corporation does not require the assistance of any court to get title, and the intent of the testator will be effected if it is a business corporation, and protected by equity if a charitable one, even if the State is limited in both to a decree of corporate death, a point emphasized by Peckham, J., in *In re McGraw* (*supra*). Furthermore, no principle of public policy appears to be violated. *Hamsher* v. *Hamsher*, 132 Ill. 273; 5 Thompson on Corporations, §§ 5787, 5795, are in accord. See 5 Thompson on Corporations, § 6033, and 9 HARVARD LAW REVIEW, 255, suggesting that in any case the question of *ultra vires* can be raised only by the State.

CRIMINAL LAW — INSANITY — BURDEN OF PROOF. — *Held*, on a trial for murder, where the defence is insanity, the burden of proving such defence is on the defendant, but he is not required to establish his defence beyond a reasonable doubt. *State* v. *Larkin*, 47 Pac. Rep. 945 (Idaho).

The ruling in this case and in the similar recent case of *State* v. *Scott*, 21 So. Rep. 272 (Ala.), is in accord with the practice in most States and with the majority of the text writers on the point. The rule is, however, a disputed one, and the better law would seem to be that of Michigan (*People* v. *Garbutt*, 17 Mich. 9) and several other States, as well as that of the Federal courts (*Davis* v. *U. S.*, 160 U. S. 469). These hold that the burden is upon the prosecution of proving both the elements of the crime, viz. the act and the intent to commit; and that while the general presumption is that the latter is present, if the accused brings forward any evidence tending to put that ques-

tion in doubt, the necessity for proof of this part of its case by the State is equal with that of proving the act itself.

CRIMINAL LAW — SELF-DEFENCE. — One who, on going to the house of another with the intention of committing adultery with the other's wife, arms himself for the purpose of self-defence if attacked by the husband, cannot avail himself of the right of self-defence to justify the killing. *Dabney* v. *State*, 21 So. Rep. 211 (Ala.). See NOTES.

CRIMINAL LAW — SELF-DEFENCE. — Where defendant and his companions with guns in their hands unlawfully entered a house in which deceased was a guest, and were ordered out by the latter, who followed them to the door, and was shot, an instruction that if the defendant in good faith abandoned the difficulty and was leaving the house, and deceased followed and pointed his gun, defendant had a right to defend himself even to taking life, if necessary, was properly refused. *Crawford* v. *State*, 21 So. Rep. 214 (Ala.).

The point of law is beyond dispute that a person cannot justify a homicide by the plea of self-defence, if the necessity for it results from his own wrongful act. But it is also equally well established that, if a person in good faith retires, he acquires the right of self-defence if assailed by the one he had previously attacked. The ruling in this case, that the withdrawal must be manifest, seems good law. The defendant having put the life of the deceased so in peril that he is under the necessity of using force, even to death, to defend himself, ought at his own peril to make it plain that that necessity no longer exists. This view is supported by *Parker* v. *State*, 7 So. Rep. 98 (Ala.).

EVIDENCE — OPINION — MENTAL CONDITION. — A witness, after stating many facts relating to a testator's conduct, and that the testator was personally known to him, was asked whether in his opinion the testator was competent to transact ordinary business. *Held*, that the answer was inadmissible as a conclusion involving expert knowledge. *Torrey* v. *Burney*, 21 So. Rep. 348 (Ala.).

By the better considered cases, a non-expert is now allowed to express his opinion as to one's insanity, provided he has set before the court sufficient facts on which to base his opinion. The decision in the principal case might well have been otherwise. The question asked was not a hypothetical one. Sufficient facts had been testified to by the witness, and he should have been allowed to state the impression they had made on his mind. This is opinion in form only; in substance it is a statement of fact. *Life Ins. Co.* v. *Lathrop*, 111 U. S. 612. It is difficult to see, on the facts of the principal case, any valid distinction between a question as to one's insanity and the question as to his competency. See *Wright* v. *Doe d. Tatham*, 5 Cl. & F. 670.

EVIDENCE — PRIVILEGED COMMUNICATIONS. — *Held*, in a suit between devisees under a will, that communications made by the testatrix to her counsel, respecting the execution of the will and a previous agreement of division, were not privileged. *Glover* v. *Patten*, 17 Sup. Ct. Rep. 411.

This is rather outside the rule that an attorney is not compellable to disclose the communications made to him by his client, than an exception to it. That rule has for its object the protection of the living in their business interests. It is plain that in the case of testamentary dispositions the ground for secrecy fails. It can be no disadvantage to the testator to have his intention made plain to the court, as between the devisees. Where, however, a third party is claiming against the representatives of the deceased client, the rule again applies. *Russell* v. *Jackson*, 9 Hare, 393.

EVIDENCE — PROOF OF INTENTION. — It being material to show that plaintiff's intestate intended to become a passenger on defendant's train, plaintiff offered declarations of the deceased, made about an hour before the train was to leave. *Held*, that the declarations were not admissible as part of the *res gestæ*. *Chicago & E. I. R. R. Co.* v. *Chancellor*, 46 N. E. Rep. 269 (Ill.).

A will was missing at the death of the testatrix. It had been left with a notary, but there was some evidence that it was last in possession of the testatrix. *Held*, that the presumption of revocation arising from these facts was rebutted by the declarations of the testatrix within three days of her death, that the will was with the notary. *In re Steinke's Will*, 70 N. W. Rep. 61 (Wis.).

The first of these cases is clearly wrong, in view of the more carefully considered modern authorities. The intention of the mind can only be shown by some external manifestation of which speech is an example. Where the manifestation is by speech, there is, of course, an element of hearsay in the evidence but the speech is so nearly original evidence, that the usual objections to hearsay do not exist. *Mutual Life Ins. Co.* v. *Hillmon*, 145 U. S. 285; *Com.* v. *Trefethen*, 157 Mass. 180.

In the second case, the declarations were admitted as evidence that the testatrix died in the belief that the will was in existence, and that state of mind negatived

the intention necessary in addition to the presumed destruction to constitute a revocation. On this ground the declarations were admissible, although if they had been offered to prove the existence of the will they would not have been admissible. These cases show that the term *res gestæ*, used by the court in the Illinois case, has no application to proof of intention. *Re Valentine's Will*, 67 N. W. Rep. 12 (Wis.).

LOCALITY OF CRIME — CONSTRUCTIVE INTENT. — The defendants attempted to commit murder in Ohio by poisoning. Thinking the victim to be dead, they carried the body into Kentucky, and there beheaded it. In fact, the victim was alive until beheaded. *Held*, that the defendants were guilty of murder in Kentucky; and that acts done in another State are evidence admissible to prove the criminal intent. *Jackson* v. *Commonwealth*, 38 S. W. Rep. 1091 (Ky.). See NOTES.

PROPERTY — ADVERSE POSSESSION — PAROL GIFT. — *Held*, where the donee of lands under a parol gift goes into possession, and claims to be the owner, there is the beginning of an adverse possession against the donor. *Schafer* v. *Hauser*, 70 N. W. Rep. 136 (Mich.).

It has sometimes been thought that possession, to be adverse, must be against the will of the rightful owner, but there seems no reason why this should be necessary. The important thing is, that the adverse party should claim title for himself to the exclusion of the true owner. That the latter consents is immaterial; the adverse claimant is none the less holding in denial of any paramount title, and if he remains in possession for the statutory period, his right is complete. *Sumner* v. *Stevens*, 47 Mass. 337.

PROPERTY — ASSUMPTION OF MORTGAGE DEBT. — B mortgaged certain land to A, who assigned the mortgage to plaintiff. B transferred the property to C, who agreed to pay the mortgage. At maturity the mortgagee foreclosed, and took possession. The property was not worth the mortgage debt. On a bill to recover the deficiency, *held*, that he was entitled to a decree against both defendants, B and C, although he could have but one satisfaction. *Flint* v. *Winter Harbor Land Co.*, 39 Atl. Rep. 634 (Me.).

There is no doubt upon the authorities that the case is right. Many States, notably New York, proceed upon the doctrine of *Lawrence* v. *Fox*, 20 N. Y. 268, but it is not necessary to resort to this anomalous doctrine. The promise of the grantee of the mortgagor is an asset or security of which the mortgagee is entitled, in equity, to avail himself. This is the view generally taken, and is the better doctrine. *Crowell* v. *Currier*, 27 N. J. Eq. 152. Where the mortgagor is solvent, it would seem that, inasmuch as the mortgagee has an adequate remedy at law, the only ground for supporting a recovery against the grantee of the mortgagor is to avoid multiplicity of action.

PROPERTY — EFFECT OF JUDGMENT ON TITLE. — Where a pledgee of securities wrongfully rehypothecated them, and after his insolvency the owner again obtained possession of them by paying the debt for which they were rehypothecated, *held*, that the fact that thereafter the owner recovered a judgment against the original pledgee for conversion of the securities did not vest title thereof in such pledgee. If the judgment represents the securities, the rights of the parties will be protected by requiring the owner to indorse a suitable credit on the judgment. *Union Pac. Ry. Co.* v. *Schiff*, 78 Fed. Rep. 216.

The decision is clearly right. The court carefully distinguish the case of *Dietz* v. *Field*, 41 N. Y. Supp. 1087, which seems to overrule the decision in *Goff* v. *Craven*, 34 Hun, 150, and which squarely supports the theory enunciated in 3 HARVARD LAW REVIEW, 326, viz. that since one who has been wrongfully dispossessed of a chattel has only a right to recover it in specie or its value, a judgment in any one of the forms of action operates like the statute of limitations to bar the owner's right to proceed against the converter, as a defendant cannot be twice harassed for the same wrong. The principle on which the decision is apparently rested is the oft-asserted one, that in an action of trover judgment merely does not vest title in the defendant. But many cases, e. g. *Lovejoy* v. *Murray*, 3 Wall. 1, 16, cited in the opinion, and the leading case of *Miller* v. *Hyde*, 161 Mass. 472 (see 8 HARVARD LAW REVIEW, 173), may be distinguished as not being cases between the parties to the judgment, the distinction taken in 3 HARVARD LAW REVIEW (*supra*). This decision is not inconsistent with the principles there stated, for the defendant had not one of the asserted essentials of title, viz. possession. Furthermore, the title is so far admitted to be in the plaintiff that the value of the securities is credited in the judgment.

PROPERTY — PURCHASER FOR VALUE. — *Held*, that where a mortgage is given to secure a past indebtedness, the lienholder is not protected against unknown equities. *Inglehuett* v. *Hunt*, 39 S. W. R. 310 (Tex.).

The decision follows the weight of authority in cases where the transfer is of land or

chattels. *Goodwin* v. *Mass. Loan Co.*, 152 Mass. 189. 2 Pom. Eq. Jur. § 749. But where the transfer is of negotiable paper, the taker is often considered, although inconsistently, as having given value. *Fisher* v. *Fisher*, 98 Mass. 303. The nature of the subject matter of the transfer can hardly be said to affect the question of consideration. The *dictum* of Story, J., in *Swift* v. *Tyson*, 16 Pet. 1, would seem to indicate that all such transfers were for value. The reason for this, if any, must be that the creditor has practically changed his position by reason of the added security. The New York courts take the opposite view. *Stalker* v. *M'Donald*, 6 Hill, 93. That a transfer in payment of an antecedent debt is for value would clearly seem to be the better opinion. *Swift* v. *Tyson*, *supra*; but see, *contra*, *Moore* v. *Ryder*, 65 N. Y. 438. For further cases on these questions, see 1 Ames's Cases on Bills and Notes, 650, n., 667, n.

PROPERTY — SURFACE WATER. — Defendant's railway embankment set back surface water upon plaintiff's land, causing damage. *Held*, that no action lies. *Walker* v. *Ry. Co.*, 17 Sup. Ct. Rep. 421.

The rule of the civil law is that the lower premises must receive the surface water which flows naturally from the higher; Pardessus, Traité des Servitudes, § 86, pp. 119, 120; and this has been followed in several States; *Martin* v. *Riddle*, 26 Penn. St. 415; *Gillham* v. *R. R. Co.*, 49 Ill. 484; *Ogburn* v. *Connor*, 46 Cal. 346. On the other hand, the doctrine of the principal case, that the owner of the lower land may, by changes in its surface, prevent surface water from coming from the higher, has long obtained in Massachusetts; *Luther* v. *The Winnisimmet Co.*, 9 Cush. 171; and has of late years been gaining in other States. *Bowlsby* v. *Speer*, 2 Vroom, 351; *Pettigrew* v. *Evansville*, 25 Wis. 223; *Swett* v. *Cutts*, 50 N. H. 439; *Barkley* v. *Wilcox*, 86 N. Y. 140. This view seems more conducive to the development of improvements on the land, which, in cases of this sort, is really the weightiest consideration. The authority of the present case will naturally have great influence in jurisdictions where the point is not settled.

PROPERTY — TRANSFER OF EXPECTANT INTEREST. — A transferred to his brother all his expectant interest in the estate of his mother, she being insane, and unable to assent thereto. The transaction was a fair one, and not made in order to defraud creditors. On the mother's death, A's creditors filed a bill to have the deed set aside. *Held*, that in such a case the ancestor's assent was not necessary. *Hale* v. *Hollon*, 39 S. W. Rep. 287 (Tex.).

In this class of cases, courts of equity have based their interference on two grounds: that fraud has been practised on the heir, and that the agreement is a fraud on the ancestor. In England the latter ground would probably be insufficient if the transaction be free from fraud in the sense that no advantage has been taken of the inexperience or needy condition of the heir, and that an adequate consideration has been paid. *Earl of Aylesford* v. *Morris*, L. R. 8 Ch. 484. The public policy of a general rule requiring the ancestor's assent may well be doubted, but where, as in the principal case, and in *McClure* v. *Raben*, 133 Ind. 507, decided the other way, the ancestor is insane, the reason for it is gone, for he cannot change the course of the descent of the property, and with the reason should go the rule itself.

QUASI-CONTRACTS — AGENT'S COMPENSATION FOR SERVICES AFTER PRINCIPAL'S DEATH. — A principal employed an agent to collect his rents and to care for his real estate. The principal died intestate, and left no known heirs. The agent, with knowledge of the principal's death, continued to collect the rents and to care for the real estate. *Held*, that the decedent's estate must pay for these services. *In re Bryant's Estate*, 36 Atl. Rep. 738 (Pa.).

As death revoked the agency, and as there were no circumstances indicating ratification, the recovery must be worked out upon theories of quasi-contract. The requirements essential to a quasi-contractual recovery were present in this case, according to the court's view of the facts. Obviously, the former agent did not intend to serve without compensation. Obviously, too, he was no mere meddler; for, as the court explains, in the extraordinary state of facts he owed "at least a moral duty to look after the property for the real owner, whoever he might prove to be." Finally, the fact that the estate was actually benefited is apparently taken for granted in the court's statement that, according to the finding of the court below, the former agent "had rendered services to the estate." Indeed, though there is a surprising dearth of authority, it seems clear that the court's view of the law is correct, though there certainly is a question whether the facts indicate that the estate was benefited in the least. The facts are more fully reported at an earlier stage of the case, in 35 Atl. Rep. 571, and 176 Pa. 309.

TORTS — CONTRIBUTORY NEGLIGENCE — PROVINCE OF COURT. — *Held*, that in

an action for negligence resulting in personal injuries, where the facts are undisputed, contributory negligence is a question for the court, and not for the jury. *Town of Salem* v. *Walker*, 46 N. E. Rep. 90 (Ind.).

A judgment for plaintiff was reversed because the question had been left to the jury, although it was not stated by the court that the inference of contributory negligence was irresistible. The decision seems utterly indefensible, and is contrary to the almost universally accepted rule that negligence is an inferential fact, to be found by the jury from other facts, under proper instructions from the court as to the law. The case should go to the jury, unless the facts are undisputed, aud only one inference is possible from them. A careful study of the cases shows that the rule laid down by the court is not law even in its own State. See *Citizens' St. R. R. Co.* v. *Spahr*, 7 Ind. App. 23; *Cincinnati, &c. Ry. Co.* v. *Grames*, 136 Ind. 39; and *Baltimore, &c. R. R. Co.* v. *Walborn*, 127 Ind. 142.

TORTS — CONVERSION — BONA FIDE PURCHASER. — A converted goods of B and sold them to C, who had no notice of B's title. *Held*, that C was not liable for conversion without proof of demand and refusal. *Stephens* v. *Meriden Britannia Co.*, 43 N. Y. Supp. 226.

This decision is in line with most of the New York cases, but it is against the great weight of authority, and can hardly be defended on principle. Since A could give C no title whatever, having none himself, C without legal justification exercised full dominion over B's goods, to which B had an immediate right of possession, and this is the essence of conversion. The argument based on the alleged injustice of holding a man liable who is guilty of no moral fault would, if carried to its logical conclusion, sweep away a large part of the law of torts. Probably most torts are committed under mistake. Even the New York cases would make C liable at once if he had resold the goods or consumed them; an utterly illogical distinction. See *Galvin* v. *Bacon*, 11 Me. 28; Ames's Cases on Torts, 286, note.

TORTS — DECEIT — SCIENTER. — *Held*, that, in an action for false warranty, *scienter* need not be alleged nor proved. *Wood* v. *Roeder*, 70 N. W. Rep. 21 (Neb.).

The case is a good example of the laxity that has crept into modern pleading, especially in code States, the declaration in its final form being so framed that it is impossible to say with any certainty whether it sounds in tort or in contract. If it be treated as a tort action, as the court seems to have treated it, to judge from the language of the opinion, the decision as to *scienter* is doubtful law. It is plainly based on the notion that where an action in contract could also have been brought, allegation or proof of *scienter* is not necessary in the tort action, a doctrine still prevalent in some jurisdictions, but repudiated by the best authorities. It is an anomaly in the law of deceit, having no basis in reason, but due to a confusion between the action in contract and in tort, coming down from the time when the action for breach of contract was treated as a tort action. See *Mahurin* v. *Harding*, 28 N. H. 128.

TORTS — PUBLIC NUISANCE — SPECIAL DAMAGE. — The defendant had unlawfully erected a fish trap in a navigable stream in such a way as to obstruct navigation and prevent the plaintiff from carrying on his business of fishing. *Held*, that the plaintiff suffered special damage, so that he was entitled to an injunction against such obstruction. *Morris* v. *Graham*, 47 Pac. Rep. 752 (Wash.).

This rule is generally stated to be, that, in order to give a private right of action for a public nuisance, the damage must be different in kind, not merely in degree, from that suffered by the public. Here the plaintiff was prevented from plying his customary trade, and in that his loss differed in kind from that of the public. The fact that the public also had the right to fish in the stream is immaterial, because they had never exercised it, and would suffer no loss, except in contemplation from its being interfered with. *Mill Co.* v. *Post*, 50 Fed. Rep. 429; *Rose* v. *Miles*, 4 M. & S. 101.

TRUSTS — POWER. — Testatrix, in accordance with a power given her under a settlement, devised land to her husband for life, adding the clause, "I give to him power to dispose of all such property by will amongst our children." The will contained no gift over in default of appointment. The husband died without exercising the power. *Held*, that the court is not bound, without more, to imply a gift to the children, and that the heir at law of the testatrix is entitled by force of the settlement. *In re Weekes' Settlement*, [1897] 1 Ch. 289.

In this case the land is disposed of by force of the settlement, so that the argument that the woman should not be left intestate is not present. The court, however, do not rest the case on that ground, but follow *Healy* v. *Donnery*, 3 Ir. C. L. Rep. 213, in the view that unless it appears from the words of the power that it was the clear intention of the testator that the class should take in any event, they will not create a trust in favor of the

class. See also *Brook* v. *Brook*, 3 Sm. & G. 280, 282. The later Irish case of *Ahearne* v. *Ahearne*, L. R. 9 Ir. 144, in which an opposite result was reached from practically the same words in the will creating the power, was unfortunately not discussed, though it seems irreconcilable. The principal case indicates a healthy reaction from the tendency of *Brown* v. *Higgs*, 4 Ves. 708, and *In re Caplin's Will*, 2 Dr. & Sm. 527, to spell out a trust on the slightest pretext.

WILLS — COMPETENCY OF WITNESSES. — A statute declared void all beneficial devises and legacies to subscribing witnesses. A will leaving all of testator's property to a corporation which was organized for charitable purposes was witnessed by two members of the corporation. *Held*, that the witnesses were competent, and the devise valid. *In re Will's Estate*, 69 N. W. Rep. 1090 (Minn.).

The case follows *Quinn* v. *Shields*, 62 Iowa, 129, and seems rightly decided. It was there said that, as the corporation was organized for charitable purposes, and not for the pecuniary benefit of its members, and as any claim of the witnesses to a share of the assets in case of dissolution of the corporation, was not only doubtful as a matter of law, but contingent on the dissolution, the existence of assets, and the life of the witnesses at the time of dissolution, there was no "present, vested, and certain pecuniary interest" in the devise to make the witnesses incompetent or interested. The common law rule as to "interest" for testing the competency of witnesses before a jury, is here applied to attesting witnesses, as it should be. *Hitchcock* v. *Shaw*, 160 Mass. 140; *Warren* v. *Baxter*, 48 Me. 193.

WILLS — PROBATE OF JOINT WILL. — *Held*, that a writing jointly executed by two persons, purporting to be their will, devising to a third person land, parts of which belong to each, can be proved as the separate will of one as to his part on his death, while the other is still living. *In re Davis' Will*, 26 S. E. Rep. 636 (N. C.).

Some courts have been startled by this sort of will, and it has been objected that no such testamentary instrument is known to the common law. See *Walker* v. *Walker*, 14 Ohio, 157. This difficulty of form is apparent rather than real. The meaning of the paper is, that it is the last will of each, so far as it relates to the property belonging to each. It is revocable by either party without notice to the other, and then stands only as the will of the party not revoking. Thus it has the ambulatory quality essential to a will. At the death of one party, the sensible course is that pursued in the principal case, to probate the instrument as his separate will. *In re Stracey*, 1 Deane, 6.

REVIEWS.

THE PRESUMPTION OF INNOCENCE IN CRIMINAL CASES. By James Bradley Thayer, LL.D. Reprinted from Yale Law Journal, March, 1897. pp. 30.

Professor Thayer was the Storrs Lecturer at Yale for 1896; and this paper contains the substance of one of the lectures delivered by him in that capacity. His object in choosing the subject of the Presumption of Innocence, was to point out and examine critically the errors which were sprinkled so plentifully through the opinion of the court in *Coffin* v. *United States*, 156 U. S. 432. In that case "the Supreme Court of the United States had an opportunity to clear up the confusion and ambiguity that hang over the common talk about the presumption of innocence in criminal cases. The opportunity was sadly misimproved." Starting with this statement, Professor Thayer proceeds to examine the origin and history of the presumption, and to analyze keenly its true nature. The serious error, which originated perhaps in a careless statement in the first volume of Greenleaf, and which played so prominent a part in the opinion in *Coffin* v. *United States*, that the presumption is to be regarded by the jury as matter of evidence, is dealt with in a manner that seems to leave nothing unsaid. Professor Thayer has handled this subject, as he has so many other subjects connected with the law of evidence, in a way that must win the admiration of all students of law.

R. G. D.